

2019 ADVANCED DUI TRIAL ADVOCACY

September 9 - 12, 2019
Phoenix, Arizona



Substitute Criminalists Rogovich Notes

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Distributed by:

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Rogovich Tip Sheet (using a substitute expert)

NOTE: we WILL NOT admit the testing analyst's written report. We get the reading in orally through the opinion of the testifying expert. The key concept is that the testifying expert must be able to form his/her own opinion regarding the test results from the review of the notes, printouts, etc. He/she will testify to his/her opinion. He/she cannot be a mere conduit for the opinion of the non-testifying analyst.

Be sure to interview your witness to make certain he/she can form his/her own opinion regarding the test results from the review of the notes, printouts, etc. and remind him/her again before he/she testifies that he/she can only testify to his/her own opinion. He/she cannot merely testify that the testing criminalist found ___ BAC or ___ drugs.

Be sure to disclose the testifying witness, all notes, reports and documents he/she will rely on and his/her opinion. *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006).

Sample Question Areas – these are not all inclusive, modify as needed

Bring out the testifying criminalist's expertise

- Job description, years of experience
- Education
- Any relevant previous job experience
- General qualifications
- Specific qualifications for conducting the analysis done in this case
- DPS permits
- Keeps up to date with publications in the field
- How many times has he/she conducted this type of analysis?
- Is it part of his/her job responsibilities?
- Does he/she supervise this type of analysis (if applicable)?
- Does he/she train others to conduct this type of analysis (if applicable)?
- Does he/she confirm these types of analysis in the lab after they are conducted?

Sample Question Areas Cont.

- Did he/she confirm this particular analysis (if applicable)? [If not, bring out lab that it is lab protocol for someone else to confirm the analysis and that that happened in this case.]

You may want to bring out information regarding the qualifications of the criminalist that conducted the analysis but who is not available. (This is not required – the testing criminalist does not have to be either qualified or an expert. *State v. Rogovich*, 188 Ariz. 41, 932 P.2d 794, 797 (1997)).

Examples include:

- The relationship between the missing criminalist and the testifying criminalist (i.e. the testing criminalist was trained by the testifying criminalist, supervised by, worked with, etc.)
- Establish that the testifying criminalist is familiar with the missing criminalist's work/procedures used to test blood/urine samples and is familiar with the fact that the missing criminalist follows proper scientific procedure. (He/she will likely have reviewed the testing criminalists work in the past.)
- The missing criminalist's job description in the crime lab required him/her to conduct these tests on a regular basis
- The missing criminalist's qualifications – if known

During a motion hearing, you may want to bring out the safeguards and protocols of the lab – especially chain of custody protocols. During trial, you certainly will need to. If the testifying expert did either of the reviews of the non-testifying expert's work, be sure to emphasize that point.

Have witness testify to the lab's quality assurance for this type of testing

Lay foundation (examples)

- Show the witness the notes and printouts and ask "what are they?"
- From your review of this exhibit, can you tell what scientific method was used to conduct the analysis in this case?
- What method was used?

- Describe this method.
- Is this method accepted in the relevant scientific community as a valid method of testing (blood or urine) for drugs (or metabolites)?
- Describe what was done in this case.
- How is it that you can form your own opinion regarding these test results?
- Based on your review of the procedure used to analyze the sample, the test results, and records, do you have an opinion as to whether the accepted technique was properly used?
- What is that opinion?
- Based on your review of the procedure used to analyze the sample, the test results, and records, do you have an opinion as to whether the readings are an accurate measurement and recording of the presences of drugs (or metabolite) in the defendant's system?
- What is that opinion?
- What was found in Defendant's urine (blood) sample?

Note – Some judges may require you to ask the following question, it was not required even under *Deason*.

- Would these test results be accepted in the relevant scientific community as valid test results?

This list is not all inclusive. See Toxicologist and Rule 702/*Daubert* scripts/predicate questions for other potential areas of questioning.

The basic legal principles and methods also apply if you get an objection that the State did not call every analyst who worked on the analysis to testify.

Quick Legal References:

General

It is the *State v. Rogovich*, 188 Ariz. 38, 932 P.2d 794 (1997) line of cases that establishes we can call a substitute criminalist/expert witness. As long as the testifying witness is able to form his/her own opinion and testifies to that opinion, there is no Confrontation Clause issue. *State v. Smith*, 215 Ariz. 221, 229, 159 P.3d 531 (2007); *State v. Tucker*, 215 Ariz. 298, 160 Ariz. 177 (2007); *State v. Dixon*, 226 Ariz. 545, 250 P.3d 226 (2011); *State v. Gomez*, 226 Ariz. 165, 244 P.3d 1163 (2010); *State v. Joseph*, 230 Ariz. 296, 283 P.3d 27 (2012), and *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014).

Case on point for blood BAC testing:

State v. Karp (Voris, Real Party in Interest) 236 Ariz. 120 (App. 2014).

Addressing *Crawford* and *Bullcoming v. New Mexico*.

State v. Karp (Voris, Real Party in Interest) 236 Ariz. 120 (App. 2014), is on point and was issued well after the *Crawford* and *Bullcoming* opinions.

Even after the US Supreme Court *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004) line of cases, the Arizona Supreme Court has consistently ruled that as long as the testifying expert forms and testifies to his own opinion, there is no Confrontation Clause problem because the defense is free to cross-examine our witness regarding his/her opinion. The most recent pronouncement by the Arizona Supreme Court is *Joseph, supra*, which is post- *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). *Williams v. Illinois*, ___ U.S. ___, 132 S.Ct. 221, 183 L.Ed.2d 89 (2012), is the most recent US Supreme Court opinion and it suggests we can admit the testimony as long as we do it correctly.

The most recent court of appeals opinions are *Karp, supra*. and *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014)

Quick Legal References Cont.

NOTE: in *Williams v. Illinois*, the US Supreme Court upheld the admission of the testimony. Moreover, in *Crawford*, they specifically stated:

. . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. . .)

Crawford, at 59, 124 S.Ct. 1354, 1369 FN9.

Chain of Custody

The US Supreme Court indicated chain of custody is not an issue in these cases merely because the state does not call the testing criminalist to testify. *See, Melendez-Diaz v. Mass.*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 FN1 (2009) (Everyone relevant to establishing chain of custody or authenticity of sample does not have to appear. Gaps in the chain go to weight not admissibility.) *State v. Gomez*, 226 Ariz. 165, 244 P.3d 1163 (2010) also indicates chain of custody is not an issue.

***State v. Moss*, – Depublished!**

Occasionally, the defense will erroneously cite to *State v. Moss*, 215 Ariz. 385, 160 P.3d 1143 (App. 2007) for the proposition that allowing one expert to review the analysis performed by another and then form his/her own opinion does violate the Confrontation Clause. This opinion, however, was depublished by the Arizona Supreme Court in *State v. Moss*, 217 Ariz. 320, 173 P.3d 1021 (2007).